Glasforms, Inc. *and* Leroy Boyd *and* United Steelworkers of America, AFL–CIO–CLC *and* Gilbert Gordon. Cases 10–CA–33715, 10–CA–33717, and 10–CA–33852

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On April 15, 2003, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent issued a written warning to William Bailey, a union supporter, and suspended him for 3 days without pay, falsely accusing him of refusing to perform part of his assigned job duties. When Bailey returned to work after his suspension, the Respondent presented him with a revised job description, which expressly required him to do amounts of work that he had not previously been required to do, and which he had indicated that he was unable to do while performing his other duties. When Bailey refused to sign the revised job description, the Respondent fired him. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by warning and suspending Bailey, changing his job description, and discharging him in retaliation for his union activity. We agree.

Facts

The Respondent produces fiberglass products at a facility in Birmingham, Alabama. One of its products, floorboards for Kenworth trucks, is made in building 3. At the time of the events in this case, the Kenworth line was normally operated 1 day a week, by Bailey, Vernon Carlson, and Supervisor Richard Parkko. Carlson was the operator of the line, and Bailey was an industrial helper assisting Carlson. Bailey was hired by the Respondent in January 2000, and thereafter was promoted and received favorable job ratings. There is no evidence that he was ever disciplined before May 2002.

One of the materials used in making the Kenworth product is an industrial resin. Until November 2001, the resin was mixed in building 2 by employees called resin techs. Because of problems in making the resin, however, the Respondent asked Bailey to learn to mix the resin himself. He agreed and, in return for a 50 cents per hour raise, the duty of learning the resin mixing process was added to his job description. Bailey apparently performed his new duties in a satisfactory manner. But although in the beginning he was required to mix only a few batches of resin, the number of batches increased as the rate of production on the Kenworth line increased. Bailey began to feel that he was overburdened and that he was unable to spend enough time assisting on the Kenworth line.

The Union began an organizing campaign at the Respondent's plant in March 2002. Bailey signed a union authorization card on March 29. The Respondent learned of the campaign and, as more fully described in the judge's decision, made a number of comments indicating antiunion animus in response to the Union's efforts. Thus, on April 23, Bailey heard one supervisor say to another that the Respondent's president was not going to let the Union come in, and that he would fire everybody first. Later that day, Parkko told Bailey that the Respondent's president had said the Union would not come in, that the employees' pay would be frozen, and that the employees would not get their July performance reviews (and hence no raises) if the Union came in. When Bailey told Parkko the employees had to get their July reviews, Parkko told him that the president would manipulate the reviews so that no employee would score high enough to be eligible for a raise.

Also in April, leadmen Kevin Lyles and Tyrone Chapman told resin tech Benjamin Mercer, on two separate occasions, that the leadmen had been instructed to go to the work areas, to see and hear what was going on about the Union, and to report it back to management. They also told Mercer that the Respondent's vice president, Roger Bass, had said that the Respondent could take away the employees' benefits and wages, and could

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. See *Standard Dry Wall Products*, 91 NLRB 544, 544–545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's decision, we disavow his reliance on *Opelika Welding*, 305 NLRB 561 (1991), and any accompanying reliance on the concept of provoked insubordination.

[2] We have substituted the Board's usual language for certain provisions of the judge's recommended Order and notice.

close the operation down and move it back to the home office in California.[3]

In late April, Bailey told supervisor Rob Rollins that he was tired of doing both the jobs of industrial helper and resin tech. Bailey added that, if the Union came in, he would go back to doing just one job. Rollins told Bailey to watch what he said and to watch his back because "they" knew what was going on.

On April 30, Bailey and Parkko were discussing the possibility of a strike. Parkko asked Bailey if he would cross the picket line if the Union called for a strike. Bailey responded that he would not cross the picket line and would not "scab."

That same day, Bailey told Parkko that he was concerned that the resin techs would not perform their usual duty of making three batches of resin to prepare for the "run day" of the Kenworth machine the next day. Parkko assured Bailey that the job would be done; he took the resin order sheet directly to resin tech Torrance Kegler[4] and instructed him that he and the techs on the following shifts were to make the usual three batches of resin for the next day.

The next morning, May 1, Bailey showed up early for work and found that the resin techs had not made any resin. He so informed Parkko on the latter's arrival. Parkko told Bailey to begin mixing the day's resin supply, and Bailey did so. When Kegler arrived later, Bailey asked him why he hadn't made any resin. Kegler, who is black, replied that he "wasn't helping no white motherf—r." Bailey, who is white, reported this exchange to Parkko, who then went with Bailey to talk to Kegler. Kegler again refused to make the resin, telling Parkko that he "didn't have to." Parkko told Bailey to continue making the resin. Bailey agreed to do so, but told Parkko that he wanted to talk with Vice President Bass and Human Resources Director Herschel Beahm when they arrived later that day; Parkko agreed that he could do so.

On a typical "run day," Bailey would make about four or five batches of resin for the Kenworth line. Because the resin techs made none on May 1, Bailey had to make all of the day's resin, a total of eight batches. The resin-mixing process took about 1 to 1-1/2 hours per batch. Because Bailey had to make three batches in addition to his regular output, he was largely unable to attend to the rest of his duties as an industrial helper.

Bailey met, as he had requested, with Bass and Beahm later on May 1. He told them that he was tired of being "cussed" by other employees, and that he could not perform all his duties as industrial helper while also performing the duties of the resin techs (i.e., making their portion of the resin). Bass and Beahme told Bailey that they would look into his problem and have a solution by the end of the day.

Later that day, Mercer gave Bailey a copy of an e-mail from Supervisor Rollins to Supervisor Tracy Patigayon regarding "Resin for building 3." It stated, "Starting Tues. next week we'll need to start making resin in building 1. The workload in building 2 and Kenworth is just too much for these guys'. []" Later, Parkko told Bailey that he would not have to mix any resin on the next run day, May 7, because the task had been reassigned to Mercer. Parkko did not indicate that there was any problem with this reassignment.

May 7 was Bailey's next workday, which he spent performing his industrial helper duties. As he had been told days earlier by Parkko, he did not mix any resin and was not asked to do so. Mercer mixed all of the resin for the Kenworth line that day. Parkko did not ask Bailey to perform any task that Bailey failed to complete, nor did he otherwise indicate that anything was amiss with Bailey's work that day, or generally.

At the end of the day, Parkko took Bailey to Plant Manager Pete Hearndon's office. Hearndon presented Bailey with a written warning that stated: "On 5/1/02, William [Bailey] confronted Roger Bass, and Herschel Beahme, and informed them that from today forward he was not going to mix resin, even if it meant being terminated." Bailey protested that that was not what he had said to Bass and Beahme, that he did not refuse to perform any of his duties on May 1, and in fact he had performed Kegler's duties as well as his own. Bailey repeatedly told Hearndon that he could not perform the duties of an industrial helper and the duties of the resin techs at the same time, because he would have to mix resin all day, and wouldn't be able to spend enough time on his other duties. Hearndon insisted that Bailey had refused to perform his job, and told him to sign the written warning. Bailey signed the warning form, but checked a box noting that he disagreed with it. Hearndon immediately placed Bailey on unpaid suspension for 3 days because of this incident. Prior to that day, Bailey had no record of discipline. Bailey asked whether Kegler was being disciplined also, and Hearndon told him that that was "none of [Bailey's] concern." In fact, the Respondent never disciplined Kegler for refusing Parkko's order to mix resin for the May 1 production run.

When Bailey returned after his suspension, Hearndon presented him with a revised job description for the industrial helper position. The new description stated that

[3] Bass, who remains vice president of the Respondent, was not called to testify.

[4] This individual's name appears in the judge's decision as "Keggins." "Kegler" is apparently the correct spelling.

the industrial helper's duties included being "[r]esponsible for mixing *all* resins [for the Kenworth line] as directed and required." (Emphasis added.) Hearndon asked Bailey to sign the description, so as to formally acknowledge that this was his job, and had been his job all along. Bailey denied that it had previously been his job to mix all the resin for the Kenworth line (as opposed to some of it), and repeated that he could not do so and perform the rest of the duties contained in the new industrial helper job description. Bailey said, consequently, he could not sign the new job description unless the newly added language was taken out. Hearndon sent Bailey home (it was a Friday), and told him to return on the following Monday. Bailey returned on Monday as requested and met with Hearndon. Hearndon again asked Bailey to sign the revised job description, and Bailey repeated his reasons for not agreeing to sign the new job description. Hearndon told Bailey that he was immediately discharged for insubordination and for failure to perform reasonable duties assigned to him; Beahme had made the final decision to terminate Bailey.

The newly added element, "Responsible for mixing all resins [for the Kenworth line] as directed and required" remained a part of the job description for the industrial helper position following Bailey's discharge. Nevertheless, Bailey's replacement in the industrial helper position, Jeannette Young, was not given the responsibility for mixing resin, nor did she otherwise ever mix any significant amount of resin; Mercer continued to mix all the resin for the Kenworth line, as he did on May 7.[5]

Discussion

As stated above, the judge found that the Respondent violated Section 8(a)(3) and (1) by issuing the written warning to Bailey, suspending him, changing his job description, and discharging him, all in direct retaliation for Bailey's support for the Union. In exceptions, the Respondent primarily asserts that its actions against Bailey were nondiscriminatory, because they were taken pursuant to its legitimate demand that Bailey fulfill his already-established and agreed-to job duties. The Respondent has also excepted to the judge's finding that it knew of Bailey's union activities or sympathies, or that any nexus could be drawn between the Respondent's "generalized" antiunion animus and its actions against Bailey.

We find no merit in the Respondent's exceptions, and agree with the judge that the Respondent's conduct violated Section 8(a)(3) and (1). The established facts amply support the finding that the Respondent's actions toward Bailey were motivated by his union support. The Respondent's blatant expressions of antiunion animus, its instructions to leadmen to spy on union supporters and report their findings back to management, the timing of its actions against Bailey relative to his expressions of support for the Union, the conspicuous lack of evidence in support of the Respondent's case, and the overall implausibility of the Respondent's account of the events, convince us that Bailey's support for the Union was a motivating factor in the Respondent's actions against him. We also agree with the judge that the Respondent failed to show that it would have taken those actions in the absence of Bailey's union activities.[6]

Our dissenting colleague, Member Schaumber, agrees that the Respondent's written warning to and suspension of Bailey violated the Act. He is also willing to assume that all of the Respondent's actions against Bailey were motivated in part by its antiunion animus. Nonetheless, Member Schaumber finds that the Respondent has established, as an affirmative defense, that it would have revised Bailey's job description and discharged him even absent his union support and the Respondent's antipathy towards the Union. Our colleague finds that the revised job description that Bailey was given to sign on May 10 "merely codified his job duties as they existed at that time," and that the Respondent acted consistently with past practice in discharging Bailey when he refused to sign the revised description.

We cannot agree. In the first place, our colleague is mistaken when he states (as the Respondent argues), that the May 10, 2002 job description "merely codified [Bailey's] job duties as they had existed at that time." The evidence shows, contrary to the Respondent's representation, that the revised description—now making Bailey directly responsible for the production of *all* Kenworth resin—presented a new and substantial increase over his previous duties.[7] The record reflects that Bailey had

[5] Mercer testified that Young had mixed "a couple of batches" of resin, but had not done so "lately." He testified that he mixed all the resin for the Kenworth line.

[6] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

We reject the Respondent's contention that it had no knowledge of Bailey's union activities. As the judge found, Supervisors Parkko and Rollins knew that Bailey supported the Union, and their knowledge can properly be imputed to the Respondent. In any event, an employer's knowledge of protected conduct can be inferred from its general knowledge of union activity, its demonstrated antiunion animus, the timing of its actions against prounion employees, and the pretextual nature of its defenses. *North Atlantic Medical Services*, 329 NLRB 85 (1999), enfd. 237 F.3d 62 (1st Cir. 2001). As all of those factors exist here, we would draw that inference if it were necessary to do so.

[7] The record shows that the Respondent maintains regular records showing the number of batches of resin any employee makes on any particular date. Thus, if the Respondent had wanted to demonstrate that

previously been responsible for mixing four to five batches of resin on a "run" day, and that the Respondent was asking him to take over the mixing of three additional batches of resin—those that previously, as a matter of regular practice, had been done by resin technicians.[8] The three additional batches of resin would have added from 3 to 4-1/2 additional hours of mixing work for Bailey, and would have required him to spend from 7 to 12 hours per run day—up from 4 to 7.5 hours—making resin.[9] This time difference would obviously have been critical to Bailey's ability to fulfill his other job duties during an 8- to 10-hour workday, which also involved being present during Kenworth production for sufficient time for him to assist the operator and to learn the operator's job.

Indeed, the substantial increase in the amount of resin mixing required under the revised job description—"mixing *all* resins as directed and required"—demonstrates that Bailey was being set up for possible discipline. The Respondent already knew that Bailey felt that he was unable to do all of the resin mixing for the Kenworth line in addition to his other duties. It had already warned and suspended him, falsely accusing him of refusing to mix resin, when all he had said was that he *could not* do all that was being asked of him. By presenting him with the revised job description, *codifying* a substantial increase in his job duties, the Respondent essentially allowed Bailey to name his poison: he could either sign the document and thus court further discipline or discharge by being unable to perform all the listed duties, or he could refuse to sign and be terminated for the refusal. Either way, the Respondent could rid itself of an unwanted union adherent. The pretextual nature of the Respondent's action in presenting Bailey with the revised job description is underscored by the fact that Bailey's replacement as industrial helper was not given the responsibility for mixing resin, nor did she ever mix any significant amount of resin. Rather, that entire job continued to be done by Mercer, to whom it had been reassigned even before the Respondent demanded that Bailey perform it.

In these circumstances, it is immaterial that the Respondent may routinely revise job descriptions,[10] or that it has discharged other employees for refusing to sign revised job descriptions. There was nothing "routine" about the Respondent's presenting Bailey with a revised job description—especially one containing extra duties that had already been assigned to another employee. To the contrary, the Respondent's revision of Bailey's job description—to increase his workload beyond what he believed he could accomplish—was a necessary step in the Respondent's effort to set Bailey up for discipline. Therefore, we reject our dissenting colleague's contention that the Respondent would have discharged Bailey in any event, even absent antiunion animus. Were it not for its antiunion animus, the Respondent would not have insisted on the increase in Bailey's duties, would not have produced the new job description, and would not have fired him for refusing to sign it.

We agree with our dissenting colleague that, absent a discriminatory motive, an employer is generally free to assign work to its employees as it sees fit. But he is wrong in suggesting that we are making an unwarranted intrusion on that freedom, or that when Bailey is reinstated, the Respondent will not be able to assign him resin-mixing duties. To the contrary, as a nonunion employer, the Respondent may make any work assignments it likes, and discipline or discharge employees who refuse to perform them, as long as it does not do so for unlawful reasons, such as retaliation for an employee's union activities or sympathies.[11] Unlike our colleague, we find that the record shows that, in this case, the Respondent's actions against Bailey clearly amounted to such unlawfully motivated conduct.

ORDER

The National Labor Relations Board orders that the Respondent, Glasforms, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing written warnings, changing its employees' job descriptions, and suspending and discharging its employees because of their support for the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Bailey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent

Bailey's revised job description did not involve an increase in his resin mixing duties, it could have produced those records, but it did not.

[8] The May 1 confrontation with Kegler confirms that this was a recent change.

[9] The judge credited Bailey's testimony that it took a total of 1 to 1-1/2 hours, from start to finish, to complete a batch of resin.

[10] Contrary to Member Schaumber's claim, there is no record evidence that the Respondent "routinely" makes such revisions. Indeed, when the Respondent added resin mixing to Bailey's job duties in November 2001, it did not formally revise his job description; rather, it merely placed a memo in his file.

[11] See, e.g., *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).

position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Bailey whole for any loss of earnings and benefits suffered as the result of the unlawful discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful change in job description, written warning, and suspension and discharge of William Bailey, and within 3 days thereafter notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Birmingham, Alabama facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER SCHAUMBER, concurring and dissenting in part.

Respondent issued a disciplinary warning and 3-day suspension to its employee William Bailey on May 7, 2002, ostensibly for "Insubordination, failure to comply with instructions and/or failure to perform job description." Although Respondent contends that Bailey told Respondent's human resources manager, Beahme, and Vice President Bass on May 1, that he "would not" perform one of the duties assigned to him (mixing resin for the manufacture of molded products), the testimony credited by the judge is that Bailey only told them that he "could not" perform all of the duties assigned to him in the time allotted. Moreover, it is undisputed that Bailey, despite his complaints, never deliberately failed to complete any of the tasks assigned to him and that the warning and suspension were issued to him by Plant Manager Hearndon without allowing him to present his version of events.

Respondent contends that no prima facie case has been established that the warning and suspension were unlawful because Bailey's expressions of support for the Union were minimal and there is no direct evidence that Beahme, Bass, or Hearndon knew of it. I agree that these facts detract from the strength of the General Counsel's case but I am nevertheless persuaded that, on balance, a prima facie case has been established, albeit a relatively weak one. I agree with the judge that an inference of antiunion animus and knowledge of Bailey's suspected pro-union sympathies may be drawn in the circumstances of this case. In addition, as more fully set forth in the judge's decision, the warning and suspension came on the heels of Bailey's expressions of support for the Union to Supervisors Parkko and Rollins, who responded to his prounion statements by suggesting that Respondent would take adverse action against union supporters.[1]

In agreement with the judge and my colleagues, I also conclude that Respondent has failed to rebut the General Counsel's case as required under *Wright Line*.[2] In reaching this conclusion, I am especially mindful of the evidence showing that, at the same time it had suspended Bailey, Respondent was presented with a blatant act of

[1] With regard to the inference of Respondent's knowledge of Bailey's suspected prounion sympathies, shortly after the union campaign began Parkko and Rollins attended a meeting conducted by Bass during which they were asked to report back to management any union activity.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), overruled in part on other grounds *Director, Office of Workers Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).

insubordination by employee Kegler,[3] who deliberately failed to complete a resin mixing assignment given to him by Parkko, and told Parkko that he would not perform that task in the future and did not have to do so. In light of Respondent's failure to take *any* action against Kegler, I cannot find that it has shown that it would have warned and suspended Bailey in the absence of his support for the Union.

I reach a different conclusion, however, with respect to Respondent's issuing a revised job description to Bailey on May 10, and discharging him when he refused to sign it. I assume, for the purpose of deciding this case, that the General Counsel established a prima facie case that Bailey's union support was a motivating factor for the issuance of the revised job description and the discharge. However, I conclude that Respondent has shown that it would have taken the same action in the absence of the perception that Bailey had prounion sympathies.

At the time of the events that gave rise to this case, Bailey's job description was out of date. Last revised on November 16, 2001, the job description stated, in pertinent part: "You must learn as soon as possible the resin mixing procedures for the CRTM unit and be fully versed in the proper procedures for accomplishing this requirement." It is undisputed that by May 2002, Bailey had not only learned these procedures but was performing them, as assigned, as a regular part of his job. Accordingly, the revised job description tendered to Bailey on May 10 stated that he was

> [r]esponsible for mixing all resins *as directed and required.*

(Emphasis added.) As shown above, this language merely codified his job duties as they existed at that time.

There is no justification for the majority's contention that the May 10 job description expanded Bailey's duties to include "all" resin mixing for the Kenworth production line. In reaching this conclusion, my colleagues read into the text of the revised job description the word "Kenworth" and effectively read out the words "as directed and required." This latter phrase limits the scope of Bailey's resin mixing duties to those he was "directed and required" to perform. I am unprepared to ignore this limiting language.

The May 10 revision to the job description was consistent with Respondent's past practice, as shown by its issuance to Bailey of revisions to the written description of his job duties in 2001, prior to any union activity, to reflect the additional requirement that he "learn" resin mixing. Respondent also presented uncontradicted evidence that it has discharged other employees who have refused to sign job descriptions or a job change form. Significantly, there is no evidence of disparate treatment with respect to this adverse action, as there was with the prior warning and suspension discussed above. Also of significance is the fact that Respondent did not discharge Bailey on the spot but gave him the weekend to "think it over" and discharged him only upon his continued refusal to sign the revised job description the following Monday.

In these circumstances, I find that Respondent was not acting in contravention of the Act when it required Bailey to sign the revised job description and then discharged him for insubordination when he refused to do so. The majority's finding of a violation, in contrast, effectively requires Respondent to rescind the revised job description and, at the very least, calls into question whether Respondent may continue to assign Bailey the resin mixing duties he previously performed. I perceive no warrant for imposing such limits on Respondent's right to assign work to its employees. Accordingly, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue written warnings, change your job description, and suspend or discharge you because you support a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Bailey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[3] Although this individual's name appears in the judge's decision as "Keggins," Kegler is apparently the correct spelling.

WE WILL make William Bailey whole, with interest, for any loss of earnings and benefits suffered as the result of the unlawful discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful change in job description, written warning, and suspension and discharge of William Bailey, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the unlawful actions against him in any way.

GLASFORMS, INC.

John Doyle, Esq., for the General Counsel.
M. Jefferson Starling III, Esq., and *Christopher T. Terrell, Esq.* for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. At the hearing the parties filed with the undersigned a joint motion for the approval of a nonBoard settlement in Cases 10–CA–33715 and 10–CA–33852 and the severance of those cases leaving only part of Case 10–CA–33717, specifically allegations 1, 2, 3, 4, 5, 6, 21(e), (f), and (h), 22, 24, and 25, which had been filed by the United Steelworkers of America AFL–CIO–CLC (the Charging Party or the Union), for trial. I granted the motion at the hearing and heard Case 10–CA–33717 on February 3, 2003, in Birmingham, Alabama. The complaint as amended at the hearing was issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board), and is based on charges filed by the Union on May 7, 2002. The complaint alleges that Glasforms, Inc. (the Respondent or the Company) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent has by its answer denied the commission of any violations of the Act.

On the entire record, including testimony of the witnesses and exhibits received in evidence and after consideration of the positions of the parties in their opening and closing statements at the hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material, Respondent has been a California corporation, with an office and place of business in Birmingham, Alabama (its facility), where it has been engaged in the business of producing fiberglass products, that during the last 12 months, Respondent, in conducting its business operations as set out above, sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of Alabama and that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. AGENTS AND SUPERVISORS

The complaint alleges, Respondent admits, and I find that at all times material, the following individuals have held the positions set forth opposite their respective names and have been agents and supervisors of Respondent within the meaning of Section 2(11) and (13) of the Act.

Peter Pfaff	President
Roger Bass	Vice President
Herschel Beahme	Director, Human Resources
Louis (Pete) Hearndon	Plant Manager
Kevin Harding	Manager
Richard Parkko	Supervisor
Robert Rollins	Supervisor
Nick Taylor	Supervisor
Tracy Patigayon	Supervisor
Jose Garcia	Supervisor
Tyrone Chapman	Leadman
Kevin Lyles	Leadman

IV. THE ALLEGED UNFAIR LABOR PRACTICES[1]

In March 2002, the Union commenced an organizational campaign among the Respondent's employees. When the Company learned of the campaign, Company officials and the Company's attorneys met with supervisors and instructed them as to how they should act and what they could and could not do under the Act. On April 23, 2002, the Company met with its supervisors in the Company's conference room in building 3 and stuffed cardboard into the window areas in the conference room for privacy.

There are 3 buildings in Respondent's complex in Birmingham, Alabama. Small diameter products such as small rods, round rods, and flatbar used for sand racing are produced in building 1. Larger diameter round rods used for electrical insulators on power poles are produced in building 2. Building 3 is used for the Kenworth floor manufacturing which is an essentially automated unit that requires a minimum of manpower to run it. There were three employees in building 3. They were William Bailey and another nonsupervisory employee named Vernon Guy Carlson and their Supervisor Richard Parkko. Carlson was the operator of the Kenworth line and Bailey was an industrial helper and assisted Carlson. Parkko also assisted as required.

The Kenworth line is a production process utilized to make floor boards for Kenworth T 2000 semitrucks. It is a CRTM unit (continuous resin transfer molding). There is a

[1] The following includes a composite of the credited testimony and the exhibits received in evidence.

balsa saw on the Kenworth line used to trim the edge of the balsawood, which is fashioned into the final product of floor boards. It is used to trim the balsawood to a 48-inch length on both ends to ensure that it is a uniform length. After a panel has been cut to length an edge saw is used to trim the edges of the panel before it goes to the CNC (computerized numerical control) machine which carves the "blank" out and installs all the drill holes. The "blank" is the designated name of the piece of balsawood which has been carved out by the CNC. In performing this process, the balsa is on pallets. The balsawood is 2.070 inches thick and is put into a die with four layers of mat on the top and on the bottom of the mat. The mat consists of woven fiberglass. Resin is injected into the mat and hardens the mat. Resin is a mixture of resin and clay and contains a catalyst which creates the heat and helps it to cure to a large form with a fiberglass finish. The resin is loaded through pressure pots. The end product of this process is the blank which is a smooth fiberglass type of product which is attached to the floor of the truck with small rib nuts.

William Bailey was employed by Respondent in January of 2000. He was promoted, received favorable job ratings and in 2001 became an industrial helper in building 3 where he worked with his Supervisor Richard Parkko and nonsupervisory employee Vernon Guy Carlson who operated the Kenworth line with assistance from Parkko and Bailey. This line was usually only operated 1 day a week. The resin utilized for the Kenworth line was called a WO mixture and was made by resin techs in building 2. However, because of problems with spills and faulty resin mixture, Plant Manager Louis (Pete) Hearndon decided that the resin should be mixed by someone in building 3 who was familiar with the Kenworth process. He and Parkko met with Bailey and asked him to "learn" the job of mixing the resin for the Kenworth process. Bailey agreed and was given a 50 cents per hour raise. This duty was added to his job duties in November of 2001, and was performed without incident by Bailey until late April 2002, and to the apparent satisfaction of Hearndon and Parkko. Initially there were only a few loads of resin required to be mixed but the production rate of the Kenworth process was increased and this required the making of additional resin batches by Bailey. As a result Bailey began to feel he was overburdened and was not able to assist with the Kenworth job during its operation as he expected to do to learn how to operate the Kenworth line.

The Union commenced an organizational campaign among Respondent's production employees in March 2002. Bailey signed a union authorization card on March 29, 2002. The Respondent became aware of the union campaign in late March. Respondent met with its supervisors and leadmen in its conference room in building 3 to discuss the union campaign. Bailey testified that about the end of March he was asked to bring cardboard to the conference room by Peter Pfaff, the president of the Company. Hersch Beahme, who was then the human resources manager, put the cardboard up to block the windows to the conference room. The meeting lasted about 3 hours and ended about 10 a.m. Bailey saw Supervisors Nick Taylor and Tracy Patigayon and Manager Kevin Harding when they came out of the meeting. He asked them what was going on. Taylor said his supervisor would let him know. Patigayon said it was "Union stuff." He also heard one of the supervisors state that President Pfaff was not going to let the Union come in and would fire everybody first.

Bailey testified that later that day his supervisor, Parkko, told him to join him for a break and they went to an outside area where smoking is permitted. Parkko told him that the building 3 employees needed to stay out of the "conflict" at building 1. Parkko also said that the Respondent's president had said the Union would not come in, that the employees' pay would be frozen and that the employees would not get their July review (raise) if the Union came in. Bailey told Parkko they had to get their July review. Parkko told him that no one would score high enough to get a raise as a score of 80 percent or better was required to be eligible for the raise.

Bailey testified further that a week to 2 weeks later he was in the breakroom in building 3 and Supervisor Parkko came in and handed him a paper and told him that if he had signed a card and no longer wanted the Union, he needed to sign the form and send it to the Union. Bailey testified he had never disclosed to Parkko that he had signed a card or asked him how to revoke the card. Bailey also testified that in late April he went to building 1 to get some gloves which were dispensed to employees by Supervisor Rollins from that location as required. He met Rollins between buildings 1 and 2. He told Rollins that he was tired of doing both jobs of industrial helper and resin tech and remarked that, if the Union came in he would go back to doing just one job. Rollins told him to watch what he said and to watch his back because they (management) knew what was going on in reference to the union campaign.

On April 30, Bailey and Supervisor Parkko were discussing the possibility of a strike and Parkko asked him if he would cross the picket line if the Union called for a strike. Bailey told Parkko he would not cross the picket line and that he would not "scab" (cross the picket line and work during a strike).

Current employee Benjamin Mercer testified concerning the union campaign in April 2002. Mercer is a resin tech who works in the resin room in building 1. Mercer mixes various resin formulas used for a number of machines including the Kenworth line in building 3. He testified that in April 2002, he had a conversation with leadman Kevin Lyles who had just returned from a meeting of management. Lyles told him that the leadmen were instructed to go to the work areas and see and hear what was going on and to report it back to the management team. Lyles told him that the management said at the meeting that it could take away the employees' benefits and wages and close the operation

down and take it back to the Company's home office in San Jose, California. Lyles told him that Vice President Roger Bass made this statement at the meeting. Shortly thereafter he saw leadman Tyrone Chapman in the resin room. Chapman also said that the leadmen and supervisors were told to go out into the work areas, to keep their eyes and ears open and to report back anything they heard about the Union. Chapman also told him that Vice President Bass had said that the operation would be closed down and taken back to San Jose, California. Mercer testified that he had several conversations with Lyles in the work area over the next couple of days during which Lyles repeated again the instructions given to the leadmen and supervisors to listen and report back anything they heard about the Union and the threat to close down the operation and take it back to San Jose, California, if the Union came in. Lyles and Chapman both denied having made these statements to Mercer. Vice President Roger Bass who remains an officer employed by the Company was not called to testify. I credit Mercer, a current employee whose testimony was straightforward and candid.

As set out above in November 2001, as a result of his dissatisfaction with the quality of the resin and spills of the resin that had occurred when performed by a resin tech in building 2, Birmingham Operations Manager Louis (Pete) Hearndon determined that it would be preferable for the mixing of the resin to be performed by someone who was familiar with the operation of the Kenworth line in building 3. He and Supervisor Parkko met with Bailey and asked him to perform the resin mixing for the Kenworth line in addition to his regular job of industrial helper. Bailey agreed and was given 50 cents per hour raise as a result. The mixing was to take place in the resin mixing area in building 2 and to be transported in pressure pots to the Kenworth line in building 3. The WO mixture is only one of over one hundred different mixtures performed by the resin techs for other operations. At that time in November 2001, the Kenworth line was only run once every week and only a limited number of blanks were produced. Bailey performed the resin mixing for the Kenworth line without incident and to the satisfaction of Hearndon and Parkko. However the volume of the resin mixing duties gradually increased as a result of increased production of the blanks on the Kenworth line with a correspondingly greater need for resin. Bailey became concerned about the increased workload that he would be unable to do both his industrial helper job, particularly on the Kenworth line and the resin mixing. However, Herndon and Parkko testified that Bailey had sufficient time to do both and that two persons watching the Kenworth line including Parkko and Guy who operated the line were sufficient for the safe operation of the Kenworth line. Bailey testified the mixing of resin takes about 1 hour to 1-1/2 including mixing time and the preparation time for mixing the resin. Herndon testified the mixing of resin takes only a 1/2 hour to 1 hour. I credit Bailey.

Bailey testified that on April 30, 2002, a Tuesday, in anticipation of the next day May 1, a Wednesday being a run day for the Kenworth line he asked Supervisor Parkko if he would take the resin sheet to building 2 to make sure that resin tech Terrance Keggins would get the resin sheet. Typically on the day before a run day Bailey would get the resin sheet from Parkko and take it to the resin room. The resin techs would make one batch on first shift, one on second shift, and one on third shift so on run day there would be three batches already made. Parkko agreed. At that time Parkko and Bailey were discussing what would happen if the Union called a strike. Parkko asked Bailey if he would cross the picket line and come in and work if they called a strike. Prior to that he had never disclosed to Parkko what he would do if the Union called a strike and he had never told Parkko that he had signed a union card. Bailey then told Parkko that he would not cross the picket line and wouldn't "scab" (work for the employer in the event of a strike). They discussed the Union all the way to the resin room during which time Parkko told him the Union only needed members because of plant closures. Bailey told Parkko that for every negative comment about the Union or positive comment about the Company, Parkko might make, he could make a positive or negative comment. Bailey told Parkko that he was concerned that Keggins would not make the resin and told Parkko that Keggins had failed to make the resin before and that when he (Bailey) came in, there was no resin. Parkko said he would hand the resin sheet to Keggins. Parkko did so and told Keggins to make one batch now and have the second and third shift make a batch so there would be three batches ready in the morning when Bailey came to set up for the Kenworth run. Bailey came in early the next day (May 1, 2002) between 3:30 and 4 a.m. His usual starting time was 7:30 a.m. but on run days he would come in at 5:30 to 6:30 a.m. to help set up for 1-1/2 to 2 hours. When he arrived at building 3 on May 1st, he turned on the lights, the overhead vacuum system, the air system, and the heaters in the die. He also turned on the gluer and started the pot heating up. All of these tasks took about a 1/2 to 1 hour. He then went to building 2 to get the resin and found there was no resin made. He then went back to finishing the set up. He did not start making resin because there was no resin sheet. He waited for Parkko to arrive and Parkko asked him to start mixing the resin. Parkko printed off another resin sheet so he could start mixing the resin and told him that he would speak to Keggins later to find out why the resin had not been made. Keggins arrived at 7:30 a.m. and Bailey asked him why he had not made the resin. Keggins who is black told Bailey who is white, "[H]e wasn't helping no white mother fucker." Bailey then went back to Parkko and told him what Keggins had said. Parkko said he would go over and take care of it and Parkko and Bailey both went back to building 2. Keggins told Parkko he was not going to make the resin as he did not have to do so. Parkko then told Bailey to mix the

resin and Bailey told Parkko he would like to speak to Human Resources Manager Herschel Beahme and Vice President Roger Bass when they came in and Parkko told him he could do so. Bailey then commenced to mix the resin. He had to get the drums of resin down as they were stacked on a pallet of four. Keggins used a forklift and put a number of drums in front of the scale where Bailey was working on the formula for the resin and then took the keys to the forklift. Notwithstanding this obstacle Bailey was able to finish off the batch. He then got Parkko to show him what Keggins had done. A short time later Keggins came back with the forklift keys and Bailey was able to move the drums out of the way. He then met with Beahme and Bass and told them he "could" not do both jobs, the resin tech job and his industrial helper job and told them he was tired of being "cussed" and recounted to them what Keggins had said. They told him they would look into this and have a solution by the end of the day. Bailey mixed all of the resin required for the Kenworth Line that day. He completed the resin sheets that day and initialed the batches he had completed. He was not able to be present for much of the operation of the Kenworth Line as he spent most of the day mixing the resin. Later in the afternoon of May 1st, he saw a copy of an E-mail from Robert Rollins to Tracy Patigayon with a copy sent to Debra Hicks regarding "Resin for building 3." It stated "Starting Tues. next week we'll need to start making resin in building 1. The workload in building 2 and Kenworth is just too much for these guys.' Debra—on Monday can you please see to it that one pallet of asp 900 p is put into the rack outside of resin room 1 as well as 7 drums of Dow 441-400 resin."

Bailey had a discussion with Parkko while he (Bailey) had a copy of the e-mail. Parkko told him they were calling in Benny Mercer early to mix the resin for May 7 which was the next day for which the Kenworth Line was scheduled to run. Bailey worked on May 7, but was not asked to mix any resin that day and did not do so. Mercer mixed the resin for that day in the building 1 resin room. Bailey had a busy day on May 7 transporting pots from the resin room in building 1 to building 3 and assisting in the operation of the Kenworth Line. At the end of the run Parkko told Bailey he was taking him into Herndon's office. Up until that time Parkko had not given Bailey any indication that there was any problem with his work. Nor had Parkko asked Bailey to do anything he could not do. Nor had Bailey indicated that there was any problem with his job.

Bailey testified he did not tell Beahme and Bass in his meeting with them on May 1st, that there were any duties he "would" not perform when directed. He told them he "could" not do both the resin tech and the industrial helper duties. He "could" not be in the resin room making resin all day and be in building 3 learning the industrial operator duties as he still had to learn how to run the machine and the CNC.

When Parkko called Bailey into Hearndon's office on May 7th, he was given a written warning and 3-day suspension on a two-page document for "Insubordination, failure to comply with instructions and/or failure to perform job description." The warning stated, "On 5/1/02, William confronted Roger Bass, and Hersch Beahme, and informed them that from today forward he was not going to mix resin, even if it meant being terminated." Bailey was told to return on May 10th, which he did and at that time was given a job description which stated that he was "2. Responsible for mixing all resins as directed and required." This job specification was designed to replace an earlier addendum dated November 16, 2001, to a prior memo from Herndon on February 15, 2001. The addendum of November 16, 2001, was signed by Bailey agreeing to it and specifically states "3. You must learn as soon as possible the resin mixing procedure for the CRTM unit and be fully versed in the proper procedures for accomplishing this requirement." Bailey contended at the hearing that he was originally only to learn the resin mixing to assist in it but was not to do the bulk of the resin mixing, for which he was paid an additional 50 cents per hour. When Bailey returned from the suspension on May 10, he was presented with the above described job specification and refused to sign it unless the resin mixing duty was deleted. He was sent home on that Friday, and told to return on the following Monday, May 13, to think it over for the weekend according to the testimony of Herndon. When he returned on May 13, he was terminated for failure to do his job.

At a related unemployment compensation hearing concerning Bailey's unemployment benefits, Hershel Beahme represented the Company at that hearing and also testified that he had not heard Bailey state that he "would" not perform the resin mixing job. Neither Beahme who is no longer employed by the Company nor Vice President Bass who remains employed by the Respondent were called to testify and Bailey's testimony that he told them he "could" not do both jobs remains unrebutted by the only two other participants in that meeting. I also credit Bailey's testimony that he did not tell Parkko that he "would" not mix the resin.

Analysis

I credit the testimony of Mercer and Bailey concerning the threats which were repeated by Respondent's supervisors and leadmen of plant closure and loss of benefits and wages.

I credit Bailey's testimony concerning the solicitation of Parkko to Bailey of his signing a withdrawal form to revoke his union authorization clause. I credit Bailey's testimony that Parkko asked him whether he would cross a picket line and the threat of plant closure and firing of employees and the threat of the loss of the annual wage increase if the Union were successful in its organizational campaign. I find that each of these statements would have been found to be violative of Section 8(a)(1) of the Act, if they had not been

deleted from the complaint. However, they establish the Respondent's animus against the Union.

I find that the General Counsel has established a prima facie case of a violation of Section 8(a)(1) and (3) of the Act by the written warning, change in job description and suspension and discharge of Bailey because of his Union and concerted activities. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that:

1. the employees engaged in protected concerted activities
2. the Respondent had knowledge or at least suspicion of the employees' protected activities
3. the employer took adverse action against the employees
4. a nexus or link between the protected concerted activities and the adverse action, underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence that it took the adverse action for a legitimate nondiscriminatory business reason.

I credit the testimony of Bailey that he signed a union card and told Parkko that he would not cross a picket line to "scab" for the Company in the event of a strike. He clearly engaged in union concerted activities by the signing of the union card and by speaking in favor of the Union to Parkko. I find his comments to Parkko and Rollins in support of the Union manifested to them his support for the Union and the knowledge of his union sympathies gained by these supervisors is imputed to the Company. The Company's antiunion animus is evidenced by the conduct of its supervisors set out above. The Company took adverse actions against Bailey by its issuance of the warning, suspension, revised job description, and discharge of Bailey while utilizing the comments by Bailey that he could not do both the resin job and the industrial helper job as a reason to support these actions. I credit Bailey that he did not refuse to do both jobs but rather told management that he "could" not do both jobs. I find the insistence by Herndon that Bailey sign a revised job specification was intended to intimidate Bailey after having wrongfully suspended him for his unrebutted candid comments to Bass and Beahme neither of whom were called to testify. Bailey was presented with a Hobson's choice by agreeing to sign the job description under duress which he did not believe he could perform or refusing to sign it in view of his suspension for unlawful reasons. *Opelika Welding*, 305 NLRB 561 (1981). I find that the actions taken against Bailey were in direct retaliation for Bailey's support of the Union and ignored the fact that the resin mixing task had been reassigned to Mercer which had eliminated the problem of Bailey's being overburdened as a result of the increase in the production of the Kenworth line and the resulting additional need for resin. I credit Mercer's unrebutted testimony at the hearing that he has since this incident performed the mixing of the resin for the Kenworth line. I thus find that the General Counsel has established a prima facie case that the adverse actions taken against Bailey were motivated by Respondent's antiunion animus. I find the Respondent has failed to rebut the prima facie case by the preponderance of the evidence as it has failed to establish that it would have taken these actions against Bailey in the absence of the unlawful motivation.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) and (3) of the Act by the issuance of the written warning and the change in job description and the suspension and discharge of employee William Bailey.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notices. It is recommended that Respondent offer immediate reinstatement to employee William Bailey who was unlawfully suspended and discharged. He shall be reinstated to his prior position or to a substantially equivalent one if his prior position no longer exists. He shall be made whole for all loss of backpay and benefits sustained by him as a result of Respondent's unfair labor practices. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]